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Supreme Court of the United States

OCTOBER TERM, 1950

No. 287

SUDAMETAL SOCIEDAD ANONIMA SUD AMERICANA DE METALES Y MINERALES, also known as SUDAMETAL, S. A.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

REPLY BRIEF FOR PETITIONER

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Respondent in its brief skirts the factual issue repeatedly stressed by petitioner that it had never imported its tin into the United States so as to become part of the commerce of the United States. Respondent does not refute this contention, for it can not. Respondent does not question or impeach the cases referred to in petitioner's main brief (pp. 19-21 inclusive), which hold that when there is no import or entry of goods into the United States, such goods are not subject to the force and authority of its laws.

See:

Royal Holland Lloyd v. *United States,* 73 Ct. Cls. 722, page 740.

Respondent predicates its argument on an assumed state of facts which contradict and ignore the record facts and respondent's own admission. The record discloses the following stipulation (R. 39-40):

"5. Immediately after the arrival of the 'SS' Collingswood in New York said tin was placed in a

bonded warehouse by order of and upon the instruction of the Customs Bureau of the Treasury Department of the United States of America. The exportation of said tin from the United States was prohibited under the terms of the Act of July 2, 1940 (54 Stat. 714), as amended June 30, 1942 (56 Stat. 463), unless and until a license for the shipment thereof to plaintiff in Argentina was first obtained. (That by the use of the word 'exportation' the claimant does not concede that (fol. 70) the shipment of the tin from New York to Argentina would be an export.)

"7. On or about the 10th day of September, 1942, the United States, acting through its Navy Department under Navy requisition No. 70, requisitioned and took possession of 523 slabs of Straits Refined tin weighing 54,180 pounds, being the tin aforesaid in storage at Bowne-Morton Stores, Inc. A photostatic copy of the notice of requisition is hereto annexed, by this reference is made a part heref, and is marked Exhibit 3.

"8. That such requisition and taking by the Navy Department was without the consent or acquiescence of the plaintiff."

Although respondent entered the tin for its own benefit and purposes and against the wishes of petitioner, nevertheless the respondent contends that, since the tin continued in the United States under a General Order issued by the United States Customs authorities, (in effect by respondent's *force majeure* since it denied petitioner's repeated requests to permit the tin to be transshipped to Argentina (R. 7, f. 8)) it could be requisitioned by the Navy Department and be paid for on the basis of the fiat prices fixed by the Office of Price Administration, an executive arm of the respondent. Respondent, through Customs, having detained the tin and impeded petitioner's attempts to continue the transshipment of the tin and having repeat-

edly denied petitioner's application for "export" licenses in pursuance of the attempt to transship, subjected the goods to requisition while they were in the bonded warehouse. Petitioner had not "imported" the tin and the only import was that made by respondent through the so-called "consumption entry". The tin arrived in New York aboard the "Collingswood" on May 4, 1942; and it was unloaded between May 4 and June 2, 1942 and on June 2 and 3 of that year the tin was placed in the bonded warehouse (R. 30). Three months later and on September 5, the Secretary of the Navy directed the requisition (R. 57) and on September 10 the requisition was actually made (R. 55).

We submit that judicial notice will be taken of the fact that all vessels under the American flag were subject to the orders of the Navy from a date immediately after the attack on Pearl Harbor, that in legal theory the "Collingswood" and its contents were under the control of the respondent through the Navy Department from the date when the goods were placed on board that ship. That tin was a critical commodity to the prosecution of the war will be judicially noticed. The record portrays cohesiveness of action and complete liaison among the various departments of respondent concentrated upon the single objective of requisitioning petitioner's tin for war purposes. The Navy controlled the tin en route to the United States, the Customs Department ordered the tin into bonded warehouse, the United States Despatch Agent, on orders of the Navy Department, made the consumption entry, respondent thus, itself, importing the tin, the Navy Department thereafter requisitioned it and the Office of Price Administration determined the so-called "fair measure" of petitioner's compensation. All of the foregoing departments acted in consequence of directions of the Executive. The Executive seized and the Executive fixed the price at substantially less than the cost of the goods to petitioner and

upon the footing that petitioner whose goods were lawfully in transit to it in Argentina must suffer the consequences borne by a people at war (cf. *United States* v. *Commodities Trading Corp.*, 339 U. S. 121).

Respondent, by the exercise of dominion over the goods and the forced entry thereof into the commerce of the United States, could not thus make of the petitioner an importer thereof, and thus subject the petitioner's goods to treatment as though the same were within the jurisdiction (Petitioner's brief, pp. 19-22, 28-31).

The "Question Presented" in Respondent's Brief (p. 2), as stated, conveys the misleading impression that petitioner had imported and entered its tin into the United States, that it had voluntarily stored the tin in a warehouse in this country and thereafter sought to export such tin to Buenos Aires, Argentina. The record fact is that the tin was shipped from Singapore on a through bill of lading to Buenos Aires, Argentina, via New York, that petitioner did not import and enter the tin and did not order the tin placed in a warehouse for its account (R. 6, f. 7).

Respondent (Brief, p. 5) on the authority of *United States* v. *New River Collieries Co.*, 262 U. S. 341, urges that petitioner can claim for its requisitioned tin only the market price prevailing at the time and place of the confiscation. Petitioner does not quarrel with that principle of law, but respectfully urges that it has no application to the facts herein. In the *Collieries* case the property confiscated had a business and permanent situs in the United States. Petitioner's tin had no such business and permanent situs (R. 6, f. 5).

Referring to the stated principle of law in the *Collieries* case, respondent states (Brief p. 5):

> "* * * To avoid this well established rule, petitioner argues that, because the tin came into a port of the

> United States on an 'intransit' order and belonged to a friendly alien, the tin was not, for purposes of determining its value, legally in New York, despite its physical location there."

This is an inaccurate statement of the facts. Plaintiff's tin did not come into the United States on an "intransit order". It arrived here under a *through bill of lading* destined for Buenos Aires, Argentina, via New York. It was refused an "intransit order" and it was refused an export license (R. 7, f. 8). Under the maxim *mobilia sequuntur personam* physical presence is not enough to subject petitioner's property to our laws. The property must have a situs here which under the authorities connotes a business or permanent presence.

Respondent states (Brief, p. 5):

> "By petitioner's voluntary action, the tin was in the United States in a bonded warehouse from which it could be taken by the owner to be sold in the United States or exported or seized by the customs authority after a year if the owner failed to enter it for consumption or exportation."

This is again an inaccurate statement of the facts. The provisions of the Tariff Act referred to in respondent's brief have not the slightest application. Petitioner's tin was not in a bonded warehouse by the voluntary action of the petitioner. It was placed in the warehouse under a General Order issued by the United States Customs authorities (R. 6, f. 7). The first alternative, to wit, entry by petitioner for consumption in the United States was clearly never its intention or desire. The second alternative, to wit, entry of the goods for re-export was again clearly not petitioner's intention or desire. Nor is there anything in the record to justify the conclusion that petitioner intended that its goods should remain in storage for

a one-year period, thereafter to be sold and the proceeds of the sale to be applied in payment of United States customs duty and storage charges.

The bill of lading stated clearly that the tin was destined for Argentina for delivery to petitioner who was named as consignee (R. 66A). Petitioner had no office in the United States (R. 5, f. 1). Petitioner did not intend to sell the tin in the United States but had a purchaser therefor in Buenos Aires (R. 53, Plaintiff's Ex. 6). The "export" of the tin was denied despite repeated efforts to obtain a license therefor, the license being denied by another arm of the Executive (R. 7, f. 8).

By the law of nations and by Presidential proclamation, respondent had the power to requisition the tin, but it had a concomitant duty and obligation, under well settled principles of law, to pay for the tin at its market value at its ultimate place of destination.

This Court's decision in *Burnet* v. *Brooks,* 288 U. S. 378, referred to by respondent (Brief, p. 6) does not invalidate petitioner's contention that under the maxim *mobilia sequuntur personam* its tin must be deemed to have a situs in Buenos Aires, Argentina. In the *Burnet* case this Court does not impeach this maxim, but holds that because of the Congressional intent latent in the revenue statute considered therein and because of the fiscal use made of the securities involved, the principle of the maxim was inapplicable. In the *Burnet* case, the securities had, in effect, a "business" situs in this country (See opinion, p. 386).

It clearly appears therein that the presence of the securities in the United States was of a permanent nature. This Court states that the Congressional intention was predicated on the then accepted principles of law with respect to the situs of intangible securities, and that they be taxed

in the light of such principles (see *Delaney* v. *Murchie*, 177 F. 2d 444, 446, affirming *Murchie* v. *Delaney*, 82 F. S. 176, 178).

For the reasons herein and in petitioner's main brief stated, no such "business situs" or "permanent location" in the United States can be imputed to petitioner's tin. Its continued presence was effected not by the voluntary action of petitioner, but by the constraint of the respondent by its refusal to permit trans-shipment of the tin to Buenos Aires, Argentina.

Respondent urges (Brief, p. 6) that petitioner's contention that its claim be judged by principles of international law must fail because the respondent had the right to requisition alien property in the United States provided no greater burden is imposed on aliens than on nationals. In support of that contention, it refers, among other authorities, to *Borchard, "Diplomatic Protection of Citizens Abroad"* (1915), page 113.

Borchard states:

> "The person and property of neutrals are in principle subject to such exceptional measures of jurisdiction and to such exceptional taxation and seizure for the use of the state as the existence of hostilities may render necessary, provided that no greater burden is imposed upon aliens than upon nationals."

In a footnote to that statement, Borchard remarks:

> "This would include the right of angary by which foreign or national vessels may be seized in the ports of the state and compelled to transport soldiers or render other military service. Phillimore, op. cit., III, 50; Hall, op. cit., 737."

Referring to the right of angary, the court in *Commercial & Estates Co. of Egypt* v. *Ball*, 1 K. B. (1925) 271,

states (p. 293):

> "On the other hand there is a well ascertained right of a belligerent Sovereign to take possession of the property of neutrals so found within his territory occupied by his forces for the purposes of warfare. *This is the right of angary.* It appears to me to be well recognized by the conventions of civilized nations, which constitute the body of international law, and *it is equally clear that it is only so recognized on the footing that the Sovereign so exercising this right makes full compensation for the property he so seizes.*" (Italics ours.)

In petitioner's main brief, the Court's attention is directed to the fact that in the *Commercial & Estates Co. of Egypt* case, the Court held that full compensation to an alien neutral for its requisitioned goods was the market value at its place of intended destination. It is submitted there is difference without distinction between the taking on the high seas by the British warship in the *Commercial & Estates Co. of Egypt* case and that at bar wherein the actual control preparatory to taking began on board the "Collingswood".

Respondent urges (Brief p. 7) that international law has nothing to do with this case. Petitioner in its main brief (p. 31) directs the Court's attention to the well settled principles of law that the law of nations is treated as part of the law of the land and that our courts will take judicial notice of the law of nations. In petitioner's main brief (p. 17) there is set forth an excerpt from the opinion of the Board of Commissioners in the *Neptune* case. The following is stated therein with respect to the contention of the British government that it was obligated to pay only the original cost of the requisitioned goods of a neutral alien:

> "The law of nations, as derived from the general principles of justice and equity, states a different doctrine."

It is clear that international law bears a reciprocal relation to municipal law, and its principles of equity and justice, rooted in municipal law, have pertinent and significant applicability to the issues herein.

In International Law (chiefly as interpreted and applied by the United States) by Charles Cheney Hyde (formerly solicitor for the Department of State of the United States), there is stated with respect to the law of nations (Vol. 1, Sec. 5, p. 17):

> "* * * Normally, it is taken for granted that international law prevails throughout the domain of a State and will be respected in the course of all the activities of its several agencies. This is true in the case of the United States. Its tribunals, and in particular the Supreme Court, are reluctant to impute to the Congress or the Executive an intention to violate the law of nations. Moreover, those tribunals when unrestricted by statutory limitations, apply and enforce the principles of international law as a part of the law of the land."

It would appear that the expressions of opinion of counsel for the respondent (wholly unsupported by any authority whatsoever) clash sharply with the conclusions (based upon solid precedent) expressed by various Chiefs of Section in the Department of Justice whose principal function is the protection of the rights of the respondent in connection with the expropriation of property.*

In the treatise mentioned in the footnote the learned authors recognize the impact of international law upon the courts of the United States. It is said in the treatise (pp.

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* See *Acquisition of Property for War Purposes* prepared in the Department of Justice, Lands Division, United States Government Printing Office, Washington, 1944.

11-12):

"b. How Far International Law is Binding as Authority in the Courts of the United States

"To what extent international law is binding upon the United States is a question which cannot be answered without a little qualifying explanation.

"Congress by enacting certain limited special jurisdictional statutes authorizing the Court of Claims to take cognizance of certain designated claims which had arisen under international law has at times directly recognized international obligations. Ratification of a treaty by the United States generally necessitates a recognition of international rights and duties. The executive branch of the Government, too, has often claimed rights under international law and at times has acknowledged obligations thereunder.

"The Constitution of the United States, in express language, recognizes but not does not define international law, 'the law of nations,' or deal with its relation to domestic law.

"From the standpoint of what actually happens in international relations it may be said that international law cannot be abrogated by domestic legislation, and in event of violation it may perchance be enforced against the violators by the aggrieved nation or nations through such international sanctions as reprisal or war.

"From the standpoint, however, of to what extent international law will be enforced as law in the domestic courts of the United States, the answer is in one respect very different. Congress may effectively legislate otherwise.

"International law is usually recognized as part of our domestic law to be applied by the courts in cases before them in regard to matters to which it is found applicable. The theory most commonly underlying

such decisions has been that international law is part of the common law. At any rate, as a rule of law for application in our courts, it is subject, like other parts of our domestic law, to change by competent legislative authority. Sensing that departures from international law readily provoke international complications our courts have gone to great lengths to find through interpretation that no conflict was intended between an act of Congress or an executive regulation and the law of nations. Our courts, however, have refused to find in international law a binding legal obligation for enforcement in our courts, either under the Constitution or under any theory of higher law, where Congress has disallowed such obligation.

"c. The Authoritative Source Materials of International Law

"In ascertaining what the rule of international law is on any particular point, in the absence of treaty or controlling executive or legislative act or judicial decision, great weight has traditionally been attributed by the courts to the works of jurists or commentators, who by years of labor, research, and experience, have made themselves peculiarly well acquainted with this subject matter.

"d. The Present Crisis in International Law

"In recent years the totalitarian aggressor nations, repudiating all obligations under traditionally received international law, have in practice asserted that military might alone is in itself a complete justification for the conquest and enslavement of other nations. Meanwhile, they have demanded meticulous observance by their victims of the traditional rules of the self-same international law which they themselves openly flout. International law, like democratic government and popular liberty, therefore, clearly now is

> in a stage of crisis. Its survival, like theirs, will be largely dependent upon victory by the United Nations."

See also: Acquisition of Property for War Purposes, pages 35, 86, 98.

As indicated above, it was competent for the Congress to legislate upon the subject of a possible conflict between the law of nations and an Executive act or Congress' own legislation. (*The Peterhoff*, 5 Wall. 28, 52; Hyde, *The Supreme Court of the United States as an Expositor of International Law*, 1937; *18 British Year Book of International Law; The Sally*, 8 Cr. 382, 384; *The Adeline*, 9 Cr. 244, 284; *The Hampton*, 5 Wall. 372; *Prize Cases*, 2 Black 635.) But the statute under which the requisition was made contained no restriction upon the invocation by this Court of established principles of the law of nations. While counsel for respondent airily dismisses the implications of the effect of the law of nations, it is noteworthy that the writers of the treatise referred to said (p. 11):

> "The Constitution of the United States, in express language, recognizes but does not define international law 'the law of nations' or deal with its relation to domestic law."

It is submitted that to the extent that the court feels that international law does have its impact upon the facts presented, all of the authorities are in unison upon the award of damages to petitioner upon the theory claimed by it and all of the decisions of international tribunals which we have found support holdings against the doctrine advanced by respondent.

We submit it is pertinent to direct attention to respondent's position in connection with the expropriation by the Mexican government of the petroleum holdings of Amer-

ican companies. In a Note of April 3, 1940 to the Mexican government, respondent said:

> "The right to expropriate property is 'coupled with and conditioned on the obligation to make adequate, effective and prompt compensation' "

and that

> "The legality of the expropriation is in effect dependent on the observance of this requirement."

(*The International Law Quarterly,* Vol. 3, No. 4, October, 1950, p. 524.)

The learned author of the article just referred to said further (p. 524):

> "There is authority in international law for the view that foreign nationals are entitled to an international minimum standard of equitable compensation" (citing Fachiri: 'Expropriation and International Law', *6 British Year Book of International Law,* pp. 159-160 (1925))
>
> "Equality of treatment of nationals and non-nationals is rarely satisfactory to the foreign claimant."

Having regard to the fact that it emerges from the record that the "Collingswood" and its cargo were at all times under the control of the respondent, that the tin was ordered into warehouse by the respondent, that the import into the United States was directed by respondent and the subsequent requisitioning took place under circumstances that petitioner's goods were attempted to be subjected by force to our jurisdiction and our laws, we submit that such taking was in violation of elementary principles of international law. There was a clear interference by respondent with petitioner's right to clear its goods through our ports for transshipment.

See:

Royal Holland Lloyd v. *United States, supra,* p. 738.

Respondent's refusal to permit the shipment to continue on to Argentina pursuant to the through bill of lading was in violation of elementary principles.

In the treatise above referred to "Acquisition of Property for War Purposes", the learned authors who collaborated on the paper stated (p. 35):

"g. The Measure of Damages for Violation

"If expropriation of the property of aliens is in the given circumstances justified under international law it is not regarded as a wrong though the given situation, like condemnation under domestic law, may be one which gives rise to an obligation to make compensation. *In such cases the compensation required is reckoned on the basis of the value of the property at the time of the taking.* (Herz, *Expropriation of Foreign Property* (1941), 35 Am. J. Int. L. 243, at p. 253, *et seq.* For discussion of the range of problems involved in dealing with "acts of state" see Mann, *Sacrosanctity of the Foreign Act of State* (1943), 59 Law Q, Rev. 42, 155. Cf. *Underhill* v. *Hernandez,* 168 U. S. 250 (1897)). If the taking is in violation of international law, however, the damages awarded under international law in recent times cover not only the value of the property taken, but also the consequential damages suffered because of the taking, including loss of profits, etc., in order so far as practicable to compensate for the entire loss suffered. (Underscoring ours.) (*The Chorzow Factory Case, Publications of Permanent Court of International Justice,* series A, No. 17; same case in *World Court Reports,* vol. 1, 1922-1926, Edited by Manley O. Hudson,

Reported case No. 16, pp. 475-719; Wise, *Tort at International Law* (1923), 17 Am. J. Int. L. 245, Herz, *Expropriation of Foreign Property* (1941), 35 Am. J. Int. L., 243 at p. 253, *et seq.* See also, for more general discussion, Yntema, *The Treaties with Germany and Compensation for War Damage; The Measure of Damages in International Law* (1924), 24 Colum. L. Rev. 134.)" (Italics ours.)

CONCLUSION

The petitioner's application for a writ of certiorari directed to the Court below should be granted.

Respectfully submitted,

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Attorney for Petitioner.